

## Appendix M: Decree of an Arbitrazh Court of the Appellate Instance

### DECREE

#### Of the Appellate Instance on the Verification of the Legality and Basis for a Decision of the Arbitrazh Court Which Has Not Yet Entered into Legal Force

City of Samara

15 June 199 9

Case No. A55-329/99-23

The Arbitrazh Court for Samara Oblast,

in the composition of :

Presiding Judge Viktorova, K.G.

And judges: Kornilov, B.A., Balaslov, V. N.

with the participation in the court session of: on behalf of the plaintiff, T.P. Kalinkina, power of attorney of 03/03/99 No. 321

on behalf of the respondent, A.A. Samoilov, representative by power of attorney of 11/06/99 No. 180 and I.P. Pavlova, power of attorney No. 181 of 11/06/99

having considered in the court session the appeal complaint of

OAOKB "TOKOBANK" in the person of its Samara branch office, city of Samara

concerning the decision (determination) of the arbitrazh court of Samara Oblast

of 12 April 199 9, in case No. A55-329/99-23

Evstifeev, V.V.

(family name of the judge who adopted the court act in question)

has established: The plaintiff made recourse [to the court] with a suit on the exaction from the respondent of 4,086,250 rubles, taking account of the change [in the value of the claim] under Article 37 of the APC RF, including: 3,000,000 rubles in indebtedness under credit contract No. 32/97 of 11/04/97 and the additional agreement of 26/12/97, and 1,086,250 rubles indebtedness for interest, including at a heightened rate.

By a decision of 12/04/99, the suit was refused.

OAo AKB “TOKOBANK” requests that the decision be reversed and the suit satisfied, as it considers that by the additional agreement of 26/12/97 to the credit contract No. 32/97 of 11/04/97, a bill of exchange credit was issued by the bank, which does not violate the norms of civil legislation. A bill of exchange is a means of payment and the issuance of the security instead of the sum of money is not a violation of the requirements of Article 819 of the Civil Code of the RF. The appellant considers that the court crudely violated the norms of substantive and procedural law, which is the basis for the reversal of the decision.

Having considered the materials of the case and having heard the explanations of the parties, the Arbitrazh court has established:

Credit contract No. 32/97 of 11/04/97 was concluded between the parties, in accordance with the conditions of which AKB “Tokobank” provided to ZAO “Ekvator” credit in the amount of 1,000,000 rubles, with a date for repayment of 15/07/97, with interest of 45%.

As a result of an additional agreement of 15/07/97, the date for the repayment of the credit was extended to 15/12/97. The amount of the interests on the credit was changed several times by additional agreements. The materials of the case confirm that the loan in the sum of 1,000,000 rubles and the interest for the use of the credit by were repaid by the borrower on 29/12/97.

By an additional agreement to the credit contract of 26/12/97 “changing the credit contract” (according to the text of the contract), the parties defined the subject of the credit contract (point 1.1) as the opening of a credit line to “the borrower” in the amount of 3,000,000 rubles for current commercial activity, with a date for repayment of 25/12/98.

It is envisioned by point 2.1 that the provision of the credit shall be done by the transfer of sums to “Borrower” or by its instruction to the account of a contracting partner.

On 26/12/97, that is, on the same day, the parties signed one more additional agreement, No. 14, point 1.1 of which defines the subject of the contract as a bill of exchange credit in the amount of 3,000,000 rubles, and the procedure for the presentation — as the issuance of four simple bills of exchange of the bank.

However, point 2 of the additional agreement No. 14 envisions that the bank is obligated to transfer a sum of money in the amount of 3,000,000 rubles according to the instructions of the “Borrower” — that is, not to the “Borrower” itself, while the latter is obligated to repay the credit and the interest for it not later than 10/15/98.

Thus, analyzing the text of the two additional agreements of 26/12/97, the court has arrived at the conclusion that the parties in concluding the additional agreements of 26/12/97 to the contract No. 32/97 did not come to a determination concerning a

significant condition — the subject of the credit contract. (Article 432 of the Civil Code of the RF).

Without definition of the subject of the contract it is not possible to consider the additional agreements to it to have been concluded.

In addition, under part 1 of Article 819 of the Civil Code of the RF, the subject of a credit contract is a sum of money, which a bank or other credit organization provides to a borrower, but not other things defined by their characteristics. The stated norm of the Civil Code is imperative. The reference of the plaintiff to the fact that the conditions for the provision to the “Borrower” of the credit of 3,000,000 rubles as a sum of money are void and that the conditions for the issuances of a credit by bills of exchange should be considered to have effect is not appropriate, since in the case of a conflict with the contract conditions, the imperative norm has absolute priority. The plaintiff did not provide any evidence of the provision of a sum of money in the amount of 3,000,000 rubles.

In accordance with the legislation in effect, a bill of exchange is a security, that is, it is not money.

Under the conditions stated above, the conclusion of the court concerning the absence of obligation of the respondent to the plaintiff under the credit contract should be recognized as properly based and the decision legal, in connection with which there is no basis for the satisfaction of the appellate complaint.

Proceeding from that set forth and being guided by Article 159 of the APC RF -

**THE ARBITRAZH COURT HAS DECREED:**

The decision of 12/04/99 is to be left without change and the appellate complaint without satisfaction.

16,015 rubles 56 kopecks state fee is to be exacted from OAO “Tokobank” in the person of the Samara branch office into the federal budget of the RF.

This decree shall enter into legal force from the time of its adoption.

Presiding Judge	[signature]	K.G. Viktorova
Judges	[signature]	Balaslov, V. N.
	[signature]	Kornilov, B. A.